IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA:

Cr.A.No.398 of 2000.

Reserved on 30.11.2007.

Date of Decision :26.12.2007.

Prem Singh. …Appellant.

Versus:

State of H.P. …Respondent.

Coram:
The Hon'ble Mr.Justice Sanjay Karol, Judge.

Whether approved for judgment?[1]

For the appellant: Mr.Vinay Thakur, Advocate.

For Respondent. Mr.Virender Verma, Additional Advocate General.

Sanjay Karol, J.

The present appeal arises out of the judgment dated 25th July, 2000 passed by the Sessions Judge, Kinnaur Session Division at Rampur Bushahr, H.P. in Session Trial No. 21 of 1998 convicting the accused for an offence under Section 436 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for a period of five years and fine of Rs.1,000/- and in default thereof to undergo simple imprisonment for further period of six months.

As per the case of the prosecution Sunak Ram (PW-2) had purchased land from Chain Ram the grand father of the accused. Two shops on the said land were let out by PW-2 to Prem Chand (PW-1) and Krishan Lal (PW-4) in village Kholighat, Tehsil Rampur, District Shimla. PW-1 was using the same as his residence and also running his business of footwear therefrom. On 2nd October, 1997 Prem

[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

Chand (PW-1) left his shop to buy vegetables from another shop at Kholighat and upon returning at about 6.30 p.m. he found that his shop as also the ad-joining shop of PW-4 was on fire. PW-1 found the accused standing outside his shop possessing one Jerrycan of 10 liters containing Kerosene oil. PW-1 inquired from the accused as to how his shop had caught fire, when he was told by the accused that the shops in question were owned by his grand father and it was he who had set the shops on fire. When PW-1 tried to retrieve his goods and put off the fire, the accused prevented him from entering the shop and retrieving his goods stored in the shop. PW-1 raised hue and cry, which attracted the attention of nearby residents and on seeing them the accused managed to escape from there. PW-1 became unconscious. Further efforts were made by the residents to extinguish the fire and in no time the shops were gutted and reduced to ashes. The goods valuing Rs.40,000/- belonging to PW-1 and Rs.6,000/- belonging to PW-4 were destroyed in the fire. On 2nd October, 1997 at about 7 P.M the police was informed vide D.D. Entry Ext.PW-8/A and the investigation was put in motion. The statement of PW-1 under Section 154 Cr.P.C. was recorded by the police on 3rd October, 1997. Pursuant to his statement, F.I.R. No. 219/97 Ext.PW-9/A was recorded on 3rd October, 1997 with Police Station, Rampur. The accused took anticipatory bail. The statements of the witnesses were recorded and the list of articles Ext. PW-1/C and Ext.PW-4/A destroyed in the fire were obtained by the Police. Spot map Ext.PW-8/C was prepared and the revenue records Ext.PW-8/D & PW-8/E were also obtained by the Police. The other papers with regard to the land in question being mark ‘X’ was also taken by the police. The sample of the burnt wood was

also taken by the police and sent for chemical analysis to the Forensic Science Laboratory, Junga (Ext.PX).

On the completion of the investigation, the challan was presented in the Court for trial and the charges against the accused under Section 436 of the Indian Penal Code were framed. The accused pleaded not guilty and claimed trial.

In order to prove its case, the prosecution examined nine witnesses. The statement of the accused under Section 313 Cr.P.C. was also recorded. The accused examined two defence witnesses.

Appreciating the material on record, the trial Court came to the conclusion that the prosecution had fully established its case beyond reasonable doubt and convicted the accused of the charged offence. The court below held that even though there was no direct evidence connecting the accused with the commission of the crime, however, the circumstance fully corroborated the prosecution version pointing towards the guilt of the accused in the commission of the offence.

I have heard the learned counsel for the parties and gone through the record.

The learned counsel for the appellant has vehemently argued that there is no direct evidence to show the complicity of the accused in the commission of the crime. In the absence of any recovery of case property i.e. Jerrycan containing Kerosene oil, it cannot be said that the chain of events leading to the circumstance, pointing the fingure towards the accused alone, is complete. Therefore, the missing link in the chain of events would render the case of the prosecution to be false and doubtful. In these circumstances, the

conviction of the accused has resulted into miscarriage of justice. He has further submitted that the case of the prosecution on the face of it is un-believable for the reason that it is not permissible for any person to remain at the spot after committing the crime. In the natural course, the accused would have fled away from the spot after having committed the crime. According to him, the case of the prosecution also stands falsified from the fact that there is variation in the D.D. Report and the prosecution evidence with regard to the intimation of the crime to the Police and there is delay in lodging of the F.I.R. The accused was not present at the spot and the case of the prosecution is false.

Per contra, the learned Additional Advocate General has argued that there is ocular evidence on record to connect the accused with the commission of the offence. The presence of the accused on the day of the commission of crime is undisputed. The police was put in motion immediately after the occurrence of the incident and, therefore, delay if any in lodging the F.I.R. was not fatal to the case of the prosecution. The complainant has got no control over the Investigating Agency and lapse on their part would not affect the case of the prosecution. Further the defence of alibi taken by the accused, through the statement of DW-2 with regard to his presence on the site of the occurrence was required to be proved by him through leading cogent and convincing evidence.

In support of his submissions, the learned counsel for the appellant has relied upon *Devinder Singh Vs. State of Himachal Pradesh* 1990 (1) Sim. L.C. 82, *Sukhram Vs. State of Maharashtra* (2007) 3 Supreme Court Cases (Cri) 426, *Rahman Vs. The State of*

U.P. AIR 1972 Supreme Court 110 and *Sharad Birdhichand Sarda Vs. State of Maharashtra* AIR 1984 Supreme Court 1622 .

PW-1 is the only spot witness. The shops in question were owned by PW-2 and were let out the same to Prem Chand (PW-1) and Krishan Lal (PW-4) who were running their business from their respective shops and PW-1 was also using the same as his residence. Ramesh Chand (PW-5) has stated that he had sold 10 liters of kerosene oil against the ration card to the father of the accused. Statements of Shri Partap Chand (PW-6) and Devi Singh (PW-7) are with regard to the case property and are formal in nature. Om Parkash (PW-8) is the Investigating Officer and Bhag Singh (PW-9) has registered F.I.R. Ext. PW-9/A and also prepared the final report under Section 173 Cr.P.C. He had stated that the goods of the occupants were totally burnt and nothing was recovered by the Police.

Statements of Prem Chand (PW-1), Sunak Ram (PW-2), Narottam Dass (PW-3), Krishan Lal (PW-4), Om Prakash (PW-8) and Bhag Singh (PW-9) are necessary to be examined to consider as to whether the prosecution has been able to prove its case beyond reasonable doubt.

As per the version of PW-1 he took the premises on rent from PW-2 and was using the same as his shop and residence. He had stocked goods of Rs.5,000/- and the value of his household articles was approximately Rs. 12,000/- . On 2nd October, 1997 at about 6 P.M. he had left the shop to buy vegetables from another shop at Kholighat. PW-4 who was also running his shop in the adjoining premises had closed down his shop and left for his house in the nearby village at about 5 P.M. When he returned back at about 6.30 P.M. he

found his shop as also the shop of PW-4 on fire. The accused Prem Singh was standing outside his shop and possessing one Jerrycan of 10 liters containing kerosene oil. He had inquired from the accused as to how his shop caught fire when he was told by the accused that PW-2 had purchased the shops and the adjacent land for a paltry sum of Rs. 1100/- from his grand father Chain Ram and the accused had been requesting PW-2 to hand over the possession of the shop to him but without any result. Since PW-2 was not ready to hand over the possession of the shops to the accused, therefore, the accused had set the shops on fire. He made effort to open the door of the shop of his premises but the accused prevented him from doing so as he had wanted the whole building to be reduced to ashes. Against the said acts of the accused he raised hue and cry. On hearing him, the residents of the nearby houses rushed to the place of occurrence and on seeing them the accused managed to escape from the spot. The whole building was reduced to ashes and the fire could not be extinguished as a result of the act of the accused. He could retrieve only some goods. At the time when the shop was on fire he could smell kerosene oil. His money amounting to Rs.3,500/- along with the property also got burnt. According to him PW-2 and his brother PW-3 reached at the spot and the entire incident was narrated to them. In the fire, Krishan Lal (PW-4) also lost his goods stacked in the shop. The Police was informed by Shri Narotam Dass (PW-3). According to him when the police reached at Kholighat on 3rd October, 1997, his statement Ext.PW-1/A was recorded and the Police took into possession burnt pieces of wood and other construction material which were entrusted to PW-2 vide Ext.PW-1/B. The list of goods as also the

cash lost in the fire (Ext.PW-1/C) was also given to the Police. In cross-examination he has however admitted that in the shop there was kerosene oil stored for cooking his food. The testimony of this witness is cogent, clear and in his cross examination there is nothing which would impeach his credibility.

PW-2 has deposed that in the year 1973 he had purchased two shops from Chain Ram at Kholighat for a sum of Rs.1100/- and he had given the shops on rent to PW-1 and PW-4. He has deposed that on inquiry from PW-1 he had informed him that the accused had set the shop on fire. According to him not only PW-1 lost his goods but even he lost his shops. This witness, however, was declared hostile and allowed to be examined by the Public Prosecutor. In the cross examination he has denied the suggestion that the accused had been asking him to vacate the shops and that he was threatened by the accused that the shops would be put on fire. This witness has admitted that PW-1 is a permanent resident of Tehsil Sarkaghat which is far away from Kholighat. He has admitted that the accused was having good relation with him. He has denied the suggestion that the residents of the area were not prepared to make any statement against the accused. He has admitted that PW-1 was dealing in footwear and both he and PW-4 had lost everything in the said fire.

PW-3 has corroborated the version of PW-2. Even he has deposed that in the evening of 2nd October, 1997 when he reached Kholighat he found PW-1 in the state of shock and was informed by him that the accused had set his house-cum-shop on fire. The premises of PW-4 according to him were also burnt in the said fire. He

has also corroborated the version of PW-1 to the effect that PW-1 had met Sunak Ram (PW-2) on 2nd October, 1997 after the fire took place.

The version of Krishan Lal (PW-4) is to the effect that both he and PW-1 were tenants of PW-2 and after having closed his shop at about 5 P.M. he had left for his house. He had stored the goods valuing of Rs.7000/- in his shop. According to him he came on 3rd October, 1997 and found his shop as also the shop of PW-1 completely burnt and PW-1 had informed him that the accused had set his shop on fire. In cross-examination he has categorically stated that PW-1 had met him at about 11 A.M. and informed him that the accused had set his shop on fire in the presence of PW-2. This fact was disclosed to him in the house of PW-2 which is at a distance of about 1 Km. from Kholighat as he has gone to search for PW-1.

The version of PW-1 that he had informed PW-2, PW-3 and PW-4 that the accused had set the shops on fire has been corroborated by the said witnesses. The witnesses have not been cross-examined on this point. The statements of the prosecution witnesses are consistent, cogent, clear and also reliable and trustworthy.

PW-8 has proved the site plan Ext.PW-8/B, statement of PW-1 Ext.PW-1/A, recovery memo Ext.PW-4/B, list of property destroyed in the fire Ext. PW-1/C and Ext.PW-4/A, revenue records Ext.PW-8/D & Ext.PW-8/E and the statements of the witnesses recorded under Section 161 Cr.P.C. In cross-examination he has stated that the goods belonging to PW-1 including iron trunk could not be recovered as the same was buried deep under the debris. He has denied the suggestion that in October at 6 P.M. it becomes dark. He

has clarified that even though there were houses ad-joining to the place of occurrence but the residents were not present at the time. As per his version he had mentioned in the case diary that neighbour Bhajan Dass and Subhadra Devi were not present in the premises as they had gone to their native places. Even he has verified the presence of the accused in the evening at Kholighat on the date of the incident which fact he ascertained from the witnesses during the course of the investigation. He has denied the suggestion that PW-2 had not stated that the accused had threatened to take back the possession of the house in question from him.

PW-9 has also stated that the goods were completely burnt and nothing could be salvaged.

As against the said evidence the accused has examined Mohar Singh (DW-1) and Ramhet (DW-2). DW-1 is the nephew of PW-4 and has been working in his shop. He has stated that there was a temporary power connection taken by PW-4 and PW-1 used kerosene stove to prepare the food in the shop. Importantly, he has deposed that he had closed the shop and left for his house. In his cross-examination he has self contradicted himself and has stated that on 2nd October, 1997 at about 5.45 P.M. when both shops caught fire he was present. This witness, therefore, cannot be said to be truthful and reliable. According to him, he does not know whether the accused had been asking PW-2 to vacate the shop. He has admitted that after the fire the accused was not present at Kholighat for number of days and he does not know as to whether the accused is the owner of the shop. PW-4 has stated that he had locked the shop at about 5 p.m. and had left for his house, therefore the statement of DW-2 about his presence at 5.45

p.m. also stands falsified. This witness is not a resident of Kholighat. In fact PW-4 does not even mention about the presence of DW-2 in his shop on the said date. This witness importantly does not state categorically that the accused was not present at the time of the occurrence of the incident.

Ramhet (DW-2) has deposed that he had seen the shop in question on fire and the public gathered there had opened the shop of PW-1 and taken out one iron box and another box from the shop. The other goods could not be taken out as the same were destroyed in the fire. He had seen PW-1 present outside his shop in tears. He has stated that the accused was nowhere to be found at Kholighat in the evening at the time of the fire. In cross-examination, he has admitted that his shop is at a distance of half a kilometer from the place of occurrence. In his cross-examination he has voluntarily stated that he had taken out the iron boxes from his shop and handed over the same to PW-1. Even he has admitted that after the incident PW-1 has left for his native place in Tehsil Sarkaghat, District Mandi and that the accused owned 4-5 shops at Kholighat. With regard to the presence of accused, this witness has only stated that the accused was nowhere to be found at Kholighat in the evening at the time of fire. According to him when he rushed towards the shop of PW-1, which was on fire, the public had gathered there. The version of this witness in fact supports the version of PW-1 who has stated that on seeing the public the accused had run away from the spot. Before DW-2 could reach, the spot, the shops were on fire and public had gathered so obviously he could not depose about the presence of the accused prior to his reaching the place of incident. It is not that this witness was present

from the time when the shops caught fire. DW-1 has admitted that the accused was not present at Kholighat after the fire for many days. As per the version of PW-8 and PW-9 nothing could be salvaged from the debris including a steel trunk belonging to PW-1. Even PW-1 was not asked about the recovery of the trunk. Assuming the statement of DW-2 to be correct to the said effect even he has deposed that other goods were destroyed in the fire.

From the statement of the aforesaid witnesses, the following circumstance emerge which conclusively establish the guilt of the accused:

1. PW-1 and PW-4 as tenants of PW-2 were running their business from the shops in question at Kholighat. PW-1 was also using the same as his residence.

2 Both PW-1 and PW-2 were having goods and property stored in their respective shops.

3. Their shops were gutted in the fire on 2nd October, 1997.

4. As per the revenue records (Ext.PW-8/D & Ext.PW-8/E) the ownership of the land where the shops were situated was that of Chain Singh grand father of the accused.

5. The accused owned number of shops in Kholighat which is evident from the statements of DW-2 and PW-2.

6. PW-1 had informed PW-2, PW-3 and PW-4 that the accused had set their shops on fire which fact was also got verified by PW-8 from the witnesses during the investigation.

7. The accused had informed PW-1 that he set the shop on fire as he wanted to take possession of the land.

8. The accused had also prevented PW-1 from retrieving his goods from the shop, as a result of which his property in the shop was reduced to ashes.

9. The shop was also fully gutted in the fire.

10. The accused who was a resident of a distant place had left for his native place in Tehsil Sarkaghat.

11. The accused was not to be seen around at Kholighat for a number of days after the incident.

Apart from the aforesaid circumstance by ocular evidence, it has also been established that accused is guilty of the commission of the crime. It is true that the Jerrycan containing kerosene oil was not taken into possession by the police during the investigation. But, however, from the statement of the witnesses it is amply clear that there is direct ocular evidence to prove the guilt of the accused with the commission of the crime. The presence of the accused has been proved at the place of occurrence by PW-1 whose version stands corroborated by PW-2, PW-3 and PW-4. DW-1 does not deny the presence of the accused at the time of occurrence of the incident and DW-2 has only stated that the accused was not to be found in the evening at the time of fire which fact only supports the version of PW-1 that the accused had run away from the place after seeing the people. The very fact that the accused had prevented the complainant from retrieving his goods and allowing the building to be reduced to ashes in my view itself would amount to an act of mischief fulfilling the essential ingredient of the charged offence. The accused

had a motive and intention and in any case knew that his action of preventing PW-1 would destroy both the shops and the goods. The intention of the accused was quite evident as he knew that the property would be destroyed and diminished in value and utility. The prosecution witnesses have stated that PW-1 was running a shop of footwear from the premises and his goods got destroyed in the fire.

Evidently, PW-1 does not belong to the area in question and is a resident of District Mandi which is far away from the place of occurrence. He had come there in search of his livelihood and was in gainful employment for the last ten years. The witnesses have further stated that he was in a great shock and there were tears in his eyes and after the incident left for his native place. PW-1 who was cobbler and in the business of footwear had ultimately lost everything in the fire and had to leave Kholighat to begin a new life. The accused who has 5-6 shops at Kholighat appears to be an influential person.

The Court below held the presence of the accused to be a strong circumstance against the accused which would show the complicity of the accused in the commission of the crime. The accused had a reason to put the building on fire and his conduct in absconding from the area is quite un-natural. The accused was granted anticipatory bail by this Court on 4th October, 1997.

As per the version of PW-1 it was Narotam Dass (PW-3) who had telephonically informed the police of the commission of crime. Even though this fact has not been so stated by PW-3, but he has stated that PW-1 was in a state of shock and he was so informed by him that the accused had set his shop on fire. Perusal of Ext. PW-8/A shows that the police was informed by the operator of the telephone

exchange. In my view the discrepancy in the version is not material rendering the case of the prosecution to be false. The fact of the matter is that the police was informed on telephone. Kholighat is a remote area having few shops. The incident took place on 2nd October, 1997 which was a national holiday when usually people go on leave to their native places and not many establishments are open. The message must have been conveyed through the Telephone Exchange. In any event, Narotam Dass (PW-3) has not been cross-examined on this point, therefore, I do not find any merit in the submission of the learned counsel for the appellant that the variation in the D.D. report about the name of the person who first conveyed the incident to the police would be fatal to the prosecution case.

The statements of the witnesses are cogent, clear, consistent and reliable. There is no delay in lodging the F.I.R. The incident took place on 2nd October, 1997; the statement of the complainant was recorded on 3rd October, 1997 and based on the same the F.I.R. was also registered on the same day. In any event the complainant had no control over the Investigating Agency and any lapse on their part would not adversely affect the case of the prosecution.

Further the defence of alibi taken by the accused that he was not present at Kholighat on the date of the incident was required to be proved by cogent and convincing evidence but this was not done so. The presence of the accused at the time of incident has been established satisfactorily by the prosecution through the reliable evidence. The evidence adduced by the accused about his absence at

the place and time of the occurrence of the offence is neither reliable nor trust worthy.

All the prosecution witnesses had no reason to falsely depose against the accused. It is not their case that there was animosity between the accused and the said witnesses. Apart from the ocular evidence all the circumstances established on record form a complete chain of events which would conclusively prove the guilt of the accused with no hypothesis of his innocence. The fact that no one had seen the accused put the house on fire and the police had not recovered the Jerrycan containing Kerosene oil, in my view would not be of much relevance in view of the fact that the accused was present at the spot and had prevented PW-1 from retrieving his goods and allowing the shops as also the goods and property to be destroyed in fire.

The ratio of law laid down by the courts in the judgments referred to by learned counsel for the appellant is not applicable in the facts and circumstances of the instant case for the simple reason that the absence of the accused after the incident is not the conclusively evidence of his guilt but is only one of the circumstance considered to prove his guilt and that apart there is ocular evidence to prove his guilt beyond reasonable doubt.

In my view, the court below has correctly appreciated the material on record while arriving at its conclusion. I see no reason to interfere with the impugned judgment. The appeal is accordingly dismissed.

(Sanjay Karol),
Judge.

December ,2007.(R)